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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRETT GILLIS, Defendant and Appellant.	B210092 (Los Angeles County Super. Ct. No. PA059368)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alice C. Hill Judge. Affirmed.

Patricia A. Andreoni, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Brett Gillis appeals from the judgment entered following a jury trial in which he was convicted of grand theft (Pen. Code, § 487, subd. (c));[1] theft from an elder or dependent adult (§ 368, subd. (d)); and false representation as an undercover officer and the commission of a theft (§ 146a, subd. (b)). In a separate court trial, he was found to have served four prior prison terms within the meaning of section 667.5, subdivision (b) and to have suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced to six years in prison. He appeals, contending that the prosecutor's use of peremptory challenges excluded prospective jurors based on race and that the trial court erred in denying his *Batson/Wheeler*[2] motion.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are not in dispute. It will suffice to observe that appellant approached 87-year-old Pascual Negrete at a Rite Aid drugstore in San Fernando. Appellant, claiming to be an undercover police officer, told Negrete that there were problems with fake money in the area and asked Negrete to hand over his cash in order to determine whether it was genuine. Appellant and Negrete went to a car where appellant pretended to examine the money. After Negrete asked for his money, appellant reached up and took Negrete's gold neck chain and fled.

At trial, during jury selection, the prosecutor had exercised peremptory challenges against six jurors when appellant's counsel made a *Batson/Wheeler* motion claiming that the prosecutor had excused four of the jurors simply because they were Hispanic. The court found that two of the four jurors (0114 and 7400) were Hispanic and one (6821) was either Hispanic or White. Defense counsel believed a fourth juror (8381) was

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[1] All subsequent statutory references shall be to the Penal Code.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258.

Hispanic but the court believed him to be White. The court found that there was a prima facie case for *Wheeler* purposes and asked the prosecutor to justify her challenges.

Juror 0114

Juror 0114 was a Hispanic male who was unemployed and had never been on a jury. He had been employed in the past. He had misidentified someone in the past. The prosecutor explained her peremptory challenge as follows: "With respect to Juror No. 0114. He was unemployed. He was much younger. I was concerned about no life experience. He answered slowly as well. I have a note that he answered questions slowly. He also appeared to me to not be interested in the proceedings, and somewhat . . . [d]isinterested. And I was mainly concerned with him about not having any life experience because of his age and his status as being unemployed. And his prior work as set storage for movies he said. Those are my reasons. He has no kids, not married, no real life experience."

Juror 6821

Juror 6821 was a heavy equipment operator, married with four grown children. The prosecutor explained her peremptory challenge to him as follows: "Again, in asking — in answering questions he was slow to answer the questions. He needed his name called before he came to the box.[3] I found that his demeanor during voir dire was that of being uninterested. He had a frown on his face as I recall. And he otherwise did not appear to me as someone that I felt would take the proceedings seriously. That's all I have in my notes."

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[3] The jurors were called to the box by their identification number. After he did not respond to his identification number on two occasions, the court was required to use this juror's name.

Juror 7400

Juror 7400 was a male Hispanic truck driver, married with two teenage children. He initially said that this was his first jury service and that he was nervous. Later he said he had been called for jury service but did not serve. He said his English was "not hundred percent" and when his number was called he did not immediately respond because he had been looking at the wrong number on his badge. Both the defense and the prosecution challenged this juror for cause based on his inability to understand everything. The court denied their challenges, stating, "It appeared to me he could answer the questions appropriately. He does have a thick accent, but he indicated he's been a truck driver for 28 years, been here previously as a juror. He answered the questions. I think he was nervous and surprised that we would consider him, because I think he's a very humble person, based on his demeanor, and I believe that he has not encountered situations such as this where he has been treated with respect. So I think that is what it was. I think he has understood everything we said. We had a number of jurors who couldn't get the last four digits, and I would say that will not convince me to excuse him. If I did that I would be excusing a whole lot of the jurors."

The prosecutor then exercised a peremptory challenge against him and later explained, "And I chose him because he did answer that he did not understand the English language a hundred percent. He didn't know his badge number. He had to be asked — he had to have his name called to come. I also have here that he had to be asked each question, and I think what that means is with respect to the questions on the wall. I think I could be wrong, but I have that note which tells me that the court had to go through those questions with him. He's a truck driver. He's an employee of a trucking company. I was concerned about that type of occupation is a very — lot of solitude, not a lot of interaction with other people, and I was concerned about life experience with respect to this case. And those are the reasons that I asked him to be excused as well."

Juror 8381

Juror 8381 said he worked as a special education teacher's assistant and at Sears. There was some dispute as to whether this juror was White or Hispanic. He had previously worked for Rite Aid but was terminated after he was accused of helping a coworker commit a theft. The juror admitted the store had reason to fire him. The prosecutor challenged this juror for cause, and the court denied the challenge. The prosecutor then exercised a peremptory challenge against him.

The Court's Findings

The court stated: "I find that the reasons given for the challenges of the four jurors: 6821, 0114, 7400, and 8381 are group neutral. . . . I find that defense has not met its burden of proving group bias. I am considering the genuineness of the proffered explanation given by the deputy district attorney. From the totality of the circumstances I find that the moving party has failed to establish by a preponderance of the evidence that the proffered explanations are [not] genuine and [are] a sham. Therefore, group bias has not been proven. And I would note — let's see. Starting with Juror No. 6821, that juror appeared to be confused. He did initially not respond when the numbers were called. He appeared to me to be almost as if he was dozing, but not with his eyes closed. The other jurors had to prod him when I was asking him a question. He could not seem to grasp the concept of the fact that he was prospective juror, I believe, No. 3. And so I concur in the reason stated by the prosecutor. He did seem to be unhappy and not really interested in the proceeding, not taking them seriously. [¶] As to Juror No. 0114, again, he did appear to me to be young, as the prosecutor stated. He was unemployed. And as I recall when he answered that question about what he did, it was sort of odd the way he answered it. He did not immediately volunteer what he had previously been doing. So that bolsters my opinion that the reasons given by [the prosecutor] are not race based but group neutral. [¶] 7400 both parties initially wanted to excuse him for cause. Although I did not grant that, certainly I think there were reasons provided at the time that request for cause were given as well as by [the prosecutor] now that were not based on race bias but

were group neutral. He did, as I noted, speak with a heavy accent and grammatical English, although I thought he had sufficient skills to sustain as a juror. [¶] Then finally 8381, again I find that the reasons given are group neutral. Juror was terminated from Rite Aid from loss prevention, admitted essentially committing a theft. So I think those are legitimate reasons. Those explanations appear to . . . be genuine and not a pretext based on the reasons I've stated. [¶] Okay. I should have additionally noted that with regard to an additional factor in my determination with regard at least to 8381 and 7400, I do recall that [the prosecutor] did specific voir dire on these gentlemen and particularly with 8381, she asked him to speak, and other jurors she has not exercised her right to speak with them."

DISCUSSION

Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 77.) In *People v. Lenix* (2008) 44 Cal.4th 602 (*Lenix*), the California Supreme Court recently reviewed and affirmed the three-step inquiry which a court must undertake when a party makes a *Batson/Wheeler* motion. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivations rests with, and never shifts from, the opponent of the strike. [Citation.]" (*Id.* at pp. 612-613.)

"The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.4th 92, 136.) "A prospective juror may be excused based upon facial expressions, gestures,

hunches, and even for arbitrary or idiosyncratic reasons. [Citations.]" (*Lenix, supra*, 44 Cal.4th at p. 613.)

The trial court must make a sincere and reasoned attempt to evaluate the prosecutor's justifications for a peremptory challenge, but is not required to give specific or detailed reasons for accepting those prosecutor's race-neutral reasons. On appeal, we determine whether the trial court's conclusion is supported by the record, utilizing a deferential standard of review. (*People v. Reynoso* (2003) 31 Cal.4th 903, 919, 924.)

While *Lenix* reaffirmed the existing standard of review, it also decided that a reviewing court must perform a comparative juror analysis even when such an analysis was not conducted in the trial court. (*Lenix*, *supra*, 44 Cal.4th at p. 607.) However, "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Id.* at p. 622.) "[C]omparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard. . . . Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent. [Citation.] Additionally, appellate review is necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. Further, the trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made." (*Id.* at p. 624.)

Although appellant suggests that the prosecutor's reasons for excusing the four jurors in question were "weak," he does not dispute that substantial evidence supports the trial court's finding that the prosecutor's reasons for excusing the jurors were not pretextual. Instead, he asks that we perform comparative analysis to determine whether the challenges were race neutral.

Before performing that task, we note appellant misapprehends the scope of comparative juror analysis. He contends that other seated jurors had "significantly greater reasons to excuse" them than the four jurors at issue. Comparative analysis does not require us to consider whether the prosecutor had "better" reasons to excuse a seated juror than those provided for excusing another. What is required is that we compare prospective juror's responses to determine whether a reason given for excusing one juror applies equally to another who was not challenged. The United States Supreme Court provided an example of the necessary analysis, stating, "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.)

We now conduct the appropriate comparative juror analysis. Appellant offers argument as to only one of the excused jurors, juror 0114, which compares this juror's answers to those proffered by other jurors who remained on the panel. He contends that the prosecutor's stated reason for excusing juror 0114, his youth, applied equally to jurors 4517, 3277, and 1824, all of whom were on the jury.

The problem is that appellant does not accurately state the prosecutor's reasons for excusing this particular juror. In addition to his youth, she pointed out that he was unemployed, answered questions slowly, and appeared disinterested in the proceedings. She summarized her rationale for excusing the juror by saying he "has no kids, [is] not married, [and has] no real life experience." When we compare the jurors who remained on the jury, there is no evidence they shared juror 0114's characteristics.

Appellant contends that juror 4517 was young, but there is no evidence in the record to support that claim. Although the juror had two 6-month-old twins, this fact alone provides little guidance on the question of his age. More to the point, the juror was employed and married, two factors that juror 0114 lacked and the prosecutor explicitly gave as reasons for excusing juror 0114. As to juror 3277, he was employed, married, and had three children. Appellant asserts this juror was young because he had young children. Again, this is not evidence that the juror was necessarily youthful. In any

event, he had the life experience juror 0114 lacked. Finally, appellant's assertion that juror 1824 was young is unsupported by the record. Although this juror was a nursing student, his studies appeared to be in preparation for a second career, as he was employed full-time at a bank. Even were we to assume the juror was youthful, he was employed, unlike juror 0114. Juror 1824 also did not appear to have difficulty answering questions, a finding made by the trial court with reference to juror 0114 that appellant does not challenge.

Appellant has failed to demonstrate that the prosecutor exercised her peremptory challenges in a discriminatory manner.

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.